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December 12, 2006

Jay Keithley  
Deputy Chief  
Consumer and Governmental Affairs Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: Nordia, Inc.  
Compliance with IP Relay Speed of Answer Rule  
CG Docket No. 03-123

Dear Mr. Keithley:

At your request, on behalf of Nordia, Inc. (Nordia), this letter clarifies the reasons previously given by Nordia in its July 28 and September 7 submissions for the company's alleged failure to meet the Commission's IP Relay Speed of Answer (SoA) rule on certain days between May 2005 and April 2006. A day-by-day explanation for Nordia's performance is provided in Exhibit 1 hereto. The information in Exhibit 1 is attested to by Mr. Pierre Grimard, Vice President – Information Technology, Nordia, Inc., who supervises Nordia's IP Relay services in the U.S. See the affidavit appended as Exhibit 2.

As documented in these exhibits, on over 90% of the days in question, Nordia's sub-standard performance was due to special circumstances beyond its control – primarily the burden of handling thousands of fraudulent calls and equipment outages (i.e., network failure). Additional details regarding the impact that these special circumstances (call fraud, network failure) had on Nordia's ability to meet the SoA standard can be found at pages 6, 9, and 10 of Nordia's original July 28 "Response" and the related affidavit of Mr. Grimard, Exhibit A, at Paragraphs 10-17. Good cause therefore exists for granting Nordia a waiver of the SoA rule on the days where these special circumstances impaired Nordia's performance. On those days, deviation from the general rule would not undermine the rule's purpose (which is to maintain performance standards for *bona fide* calls during normal network operations) and would otherwise serve the public interest in the competitive provision of TRS call center services. Moreover, if Nordia had been able to refuse or terminate service to all fraudulent callers, Nordia's performance would have met or exceeded the minimum SoA standard.

On less than 10% of the days where Nordia's performance did not meet the letter of the Commission's SoA rule, Nordia nevertheless was in substantial compliance with the rule (i.e., on most days, it answered 80% or more of call requests within 10 seconds which is at least 94% of the required performance level). Consequently, consistent with prior Commission policy<sup>1</sup> on these additional days, based on its substantial compliance, Nordia is also entitled to be reimbursed fully for the services it provided.

#### Additional Points

The public interest would not be harmed by a waiver because Nordia will not profit from retaining the TRS reimbursements at issue. TRS carriers are reimbursed in arrears and only for their actual costs. Further, as noted in Nordia's prior July 28 "Response and Petition for Waiver," the annual data collection forms submitted to NECA by Nordia for the 2004 – 2005 and 2005 – 2006 years show that Nordia's estimated IP Relay costs per minute were more than 100% and 50% higher, respectively, than the average annual compensation rate adopted by the Bureau.

In these circumstances, repayment of any monies sought by the Bureau would cause a serious financial hardship to Nordia, one of the smallest TRS providers in the market, and impair its future ability to offer competitive services. It would also unfairly penalize Nordia despite the company's costly efforts to maintain service to IP Relay users in the face of unprecedented volumes of fraudulent calls and would make Nordia itself a further unintended victim of the illegal TRS activity that the company sought to stem.

Beyond that, TRS providers are only reimbursed for completed calls (i.e., for service which have actually been provided). Thus, in distinction to other cases where the FCC has sought to reclaim public funds remitted to parties that have not complied with

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<sup>1</sup> "We recognize that absolute compliance with each component of the rules may not always be necessary to fulfill the purposes of the statute and the policy objectives of the implementing rules, and that not every minor deviation would justify withholding funding from a legitimate TRS provider. We therefore hold that a TRS provider is eligible for TRS Fund reimbursement if it has substantially complied with Section 64.604." *Publix Network Corporation; Customer Attendants, LLC; Revenue Controls Corporation; SignTel, Inc.; and Focus Group, LLC. Order to Show Cause and Notice of Opportunity for Hearing* 17, FCC Rcd 11487, ¶ 19 (2002). The concept of "substantial compliance" was recently affirmed by the FCC in its decision to compensate providers from the Interstate TRS Fund for their provision of IP Relay services prior to the release of an order defining certain standards for the service. *See Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, *Order on Reconsideration* 20 FCC Rcd 5433, ¶ 31 (2005).

its rules, all the reimbursements at issue pertain to services that Nordia has duly provided and for which it has incurred *bona fide* costs that have already been disbursed.<sup>2</sup>

Finally, neither Section 225 of the Communications Act nor Part 64 of FCC rules establish mechanisms for repayment of TRS reimbursements received by allegedly non-compliant TRS providers. In Nordia's view, any demand for a repayment would constitute a *de facto* forfeiture notice and would need to satisfy the prerequisite for a Notice of Apparent Liability (NOAL) under Section 503 of the Act, which the Bureau's original June 15, 2006 compliance letter does not do.

In addition, Section 1.80 of the Rules does not establish any express forfeiture percentage or amount for failure to comply with the 85/10 rule. Hence, to the extent the Bureau does not waive or otherwise excuse compliance for the reasons stated above, Nordia requests that the Bureau provide the company with a reasonable opportunity to show why it would be inequitable to require forfeiture of a full day's reimbursement for days on which the SoA standard was missed for a very small percentage of calls. In such cases, at a minimum, common principles of equity dictate that any repayment must be proportionate to the rule violation and, therefore, limited to the percentage of calls falling below the SoA standard.

By the way of example, if Nordia's SoA was 80% on a given day (instead of the standard 85% or greater), then equity suggests that Nordia only be required to forfeit 5% of the compensation received – that is, compensation received for the 5% of calls that exceeded the 15% "grace" volume of calls not answered in 10 seconds. Any greater repayment would amount to a clear penalty and, as noted earlier, there is no basis in the Communications Act, the FCC's TRS rules or the agency's forfeiture rules for currently assessing any penalty on a TRS provider for failure to comply with a mandatory minimum performance standard.

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<sup>2</sup> Compare, e.g., *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, Order, 18 FCC Rcd 27090 (1999). There, the FCC directed the Universal Service Administrative Company (USAC) to seek reimbursement of E-Rate funds from "ineligible entities." These entities were ineligible because they were not a telecommunications carrier or because they provided an ineligible service. In other words, they were not eligible to provide the service or they provided the wrong service. There is a significant difference between the E-Rate reimbursement cases and the circumstances in this proceeding because here Nordia is an eligible IP Relay provider and it did provide the IP Relay services for which it was reimbursed.

### Request for Confidential Treatment of New Exhibits

Pursuant to the Freedom of Information Act (FOIA),<sup>3</sup> and Sections 0.457 and 0.459 of the Commission's Rules,<sup>4</sup> Nordia requests that Exhibit 1 to this letter be withheld from public inspection and be treated confidentially because it contains sensitive proprietary or financial information.

In support of its request for confidential treatment and pursuant to the requirements under Section 0.459(b) of the Commission's Rules, Nordia states the following:

1. Nordia seeks confidential treatment of the business, technical and answer performance data provided in Exhibit 1 hereto.

2. The information in Exhibit 1 is being submitted voluntarily by Nordia at the request of the Consumer and Governmental Affairs Bureau regarding Nordia's compliance with the IP speed of answer rule.

3. The above described information is sensitive commercial and financial information which constitutes information that "would customarily be safeguarded from competitors,"<sup>5</sup> and is therefore exempted from disclosure under Section 0.457 of the Commission's Rules.<sup>6</sup> This would also be consistent with the Commission's policy in this area to keep all TRS providers' financial data confidential.<sup>7</sup> In regard to the answer performance data, the Bureau also specifically indicated in its June 15, 2006 Letter (at p. 5) that it will be kept confidential.

4 & 5. The documentation concerns Nordia's provision of highly competitive IP Relay services. There are currently at least six other national providers of IP Relay and competition for IP-based TRS has recently accelerated following the FCC's decision to

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<sup>3</sup> 5 U.S.C. § 552(b)(4).

<sup>4</sup> 47 C.F.R. §§ 0.457, 0.459.

<sup>5</sup> 47 C.F.R. § 0.457(d)(2).

<sup>6</sup> 5 U.S.C. § 552(b)(4); 47 C.F.R. § 0.457(d).

<sup>7</sup> 47 C.F.R. § 64.604(c)(5)(iii)(I) (requiring NECA to keep TRS providers' data confidential).


implement a nationwide certification regime for IP-based TRS Relay providers.<sup>8</sup> Disclosure of the information, therefore, would adversely impact Nordia's ability to remain competitive in the IP Relay market. It would allow third parties to use this information to their competitive advantage by, for example, disclosing information regarding the management of Nordia's call centers.

6 & 7. The business and answer performance data and call data being submitted herein are not available to the public, and, with the exception of NECA, there has been no prior disclosure of such information to third parties.

8. Nordia requests confidential treatment of the identified information for an indefinite period. Release of this information at any time may cause substantial competitive harm to the company.

In closing, let me say that I hope the above is responsive to your supplemental information request but if any further submission is desired, please contact me directly,

Sincerely,



Gregory C. Staple  
Counsel for Nordia, Inc.

Enclosures

cc: Secretary, FCC (redacted version)

DC 638087v.1

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<sup>8</sup> See *Telecommunications Relay Services and Speech-to-Speech Service for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, *Report and Order and Order on Reconsideration*, FCC 05-203.

**PUBLIC INSPECTION COPY**

NORDIA SECOND SUPPLEMENT TO  
RESPONSE AND PETITION FOR WAIVER

EXHIBIT 1

**REDACTED**

**PUBLIC INSPECTION COPY**    **NORDIA SECOND SUPPLEMENT TO  
RESPONSE AND PETITION  
FOR WAIVER**

**EXHIBIT 2**


**Affidavit of Pierre Grimard**

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1. My name is Pierre Grimard and I am currently the Vice-President – Information Technology at Nordia, Inc. Since 2004, I have been responsible for supervising Nordia's introduction and subsequent provision of IP Relay services in the United States. In that capacity, I have personal knowledge of the day-to-day operation of Nordia's IP Relay service including the management of Nordia's call centers.

2. The day-by-day explanation of Nordia's answer performance compiled in the accompanying table, labeled "Exhibit 1 – Nordia Second Supplement to Response and Petition for Waiver," was prepared under my direction. Exhibit 1 supplements the information on Nordia's answer performance for the May 2005 – April 2006 period provided in my prior July 27 and September 6, 2006 affidavits.

I declare under penalty of perjury that the statements made in this affidavit and the information supplemented in the aforesated Exhibit 1 are true and correct to the best of my knowledge, information and belief.

  
Pierre Grimard

Date: December 11, 2006

Sworn to and subscribed before me this 11th day of December, 2006.

Lynne Gregoire 59631  
Notary Public

My Commission expires: \_\_\_\_\_

